No. 13552

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAFO IVANCEVIC, Consul General of the Federal People's Republic of Yugoslavia,

Appellant,

vs.

ANDRIJA ARTUKOVIC,

Appellee.

JAMES J. BOYLE, United States Marshal,

Appellant,

vs.

ANDRIJA ARTUKOVIC,

Appellee.

APPELLANTS' REPLY BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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APPELLANTS' REPLY BRIEF.

Introduction.

Before subjecting appellee's argument to the light of analysis and the consequent exposure of its complete artificiality and lack of foundation in logic or law, appellants believe that the attention of the Court should be directed to the nature and scope of the issue which it is called upon to decide. For what hangs in the balance on this appeal

is the continuing validity as between the United States and Yugoslavia of all of the treaties entered into between the United States and Serbia prior to the union with the latter of certain former Austro-Hungarian provinces and Montenegro. For, while technically only the Extradition Treaty of 1901 is involved in this case, actually the validity of the Convention of Commerce and Navigation of 1881 and of the Consular Convention of 1881 (2 Malloy 1613, 1618, 1621) is equally involved, as all three treaties stand upon the same footing. This, indeed, is recognized by appellee in his statement of Point III of his brief (p. 34).

As we have shown in our opening brief, both the Yugoslav* and United States Governments have considered these treaties to be in full force and effect, notwithstanding the union, and the relations between the two countries have been, and are now being conducted largely within their framework. Appellee's position is that both Governments are and have been wrong, and that the United States need not now respect any rights granted by it in such treaties to Serbia. But the coin has an obverse: the treaties grant rights not only to Serbia but to the United States, as well. Obviously, if Serbia's union with the

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*For convenience sake, the words Yugoslav and Yugoslavia are used herein indiscriminately to refer to the Kingdom of the Serbs, Croats and Slovenes, the Kingdom of Yugoslavia and the Federal People's Republic of Yugoslavia. This is and has been the popular name for the country regardless of changes in its formal name which are irrelevant to the discussion herein.

other territories extinguished the rights so granted by the United States, by the same token the rights so granted to the United States have also been extinguished. That this is not an academic matter is witnessed by the importance which the United States Government attached to such rights, when, in 1946 as a condition of recognizing the republican government which had replaced the monarchy in Yugoslavia, the United States requested and received the new government's assurances that it recognized the continuing validity as between the United States and Yugoslavia of the latter's international obligations [R. pp. 75-78] which must, of necessity, have included those contained in the treaties concluded between the United States and Serbia which, as early as 1921, both countries had agreed had survived the organization of the Yugoslav union (V Hackworth, pp. 374, 375). Thus, the subtle appeal of appellee's argument that the organization of Yugoslavia relieved the United States of its obligations under its treaties with Serbia is at once dissipated when it is recognized that its inescapable consequence would be to deny to the United States rights which it claims and which Yugoslavia concedes.

In the light of the foregoing, let us consider the argument whereby the appellee would persuade this Court that treaty rights and obligations which both governments have recognized as obtaining, do not exist as a matter of law, and have not existed for some thirty-two years during which many of such rights and obligations have been claimed and fulfilled.

I.

The Union With Serbia of the Former Austro-Hungarian Provinces and Montenegro Did Not Result in the Extinguishment of Serbia's Treaties.

Appellee argues that as a matter of law, the voluntary union with Serbia of the former Austro-Hungarian provinces and Montenegro resulted *ipso facto* and *eo instante,* in the disappearance of Serbia and the consequent extinguishment of international treaties to which Serbia was a party. But, such a grotesque concept has no more validity under international law than it has in private law, and none of the authorities cited by appellee support it. They are all addressed to the situation created by the absorption of one state into the territory of another *existing* state which has its own already subsisting network of international rights and obligations. Serbia's acquiesence to the new union was not of this nature and did not result in the extinction of Serbia's treaty rights and obligations. This is accomplished when, as in the case of Japan's forceful annexation of Korea and as in the case of Hawaii's voluntary annexation to the United States for example, one sovereign power is absorbed into another existing sovereign power and the former's sovereignty is expressly extinguished. In this connection, it is significant that notwithstanding the extinction of Hawaii's sovereignty by the act of its annexation to the United States, the American Congress nevertheless thought it prudent specifically to abrogate treaties to which Hawaii had been a party, presumably because, even in such case, there was some apprehension that they would otherwise survive. (Joint Resolution, July 7, 1898, V Hackworth 361.)

Thus, it is merely an exercise in semantics to talk about the absorption of Serbia into Yugoslavia in the same context. Yugoslavia was nonexistent until the union with Serbia of the former Austro-Hungarian provinces and Montenegro. Until that moment, Yugoslavia was without form or substance and had neither sovereignty nor territory. It "absorbed" Serbia only by the *process of coming into being as its successor,* endowed with the rights and encumbered by the obligations of the sovereign which it had succeeded, and from which its own sovereignty was derived.

II.

Whether Yugoslavia Was or Was Not a "New" State Is Wholly Immaterial, Since if It Was a "New" State, It Was the Successor State to Serbia.

The remainder of appellee's argument in chief, consisting of a labored attempt to demonstrate that Yugoslavia was a "new" state, is as ineffective as it is irrelevant. That the royal dynasty of Serbia became the royal dynasty of Yugoslavia, that the Serbian parliament and cabinet was succeeded by a Yugoslav parliament and cabinet and that the Serbian legations and missions were transformed into Yugoslavia legations and missions (Appellee's Br. pp. 12-16), merely demonstrates, of course, that Serbia was succeeded by Yugoslavia. Very few of the European states have undergone no transformations and thus have not had new flags and coats-of-arms (see Appellee's Br. p. 16). Yet these circumstances have in no way affected the continuity of their international relationships, and the accretion in territory and population merely evidences the fact which is our starting point, to wit, that there was a

voluntary union with Serbia of the former Austro-Hungarian provinces and Montenegro. The modernization of the calendar and other such trivia do not merit separate comment. It is only sterile and meaningless casuistry to split hairs as to whether Yugoslavia is a "new" state or merely an enlarged Serbia, for there is no inconsistency in considering Yugoslavia as a "new" state and at the same time as the successor to Serbia's international rights and obligations. Thus, while as appellee points out, Hackworth lists the recognition of Yugoslavia as that of a "new" state (Appellee's Br. p. 30), he also indexes the reference of Yugoslavia's recognition of, and Secretary Hughes' opinion with respect to the continuing validity of the Serbian treaties (V Hackworth 374, 375) under "Treaties—Sovereignty, change of" (VIII Hackworth 308). Furthermore, Hackworth's reference under "Treaties—State Succession" is *"See* Government, effect of change of, *supra;* Sovereignty, change of, *supra"* (VIII Hackworth 308). Thus, if Hackworth's method of indexing is relevant, it must be noted that in his indexing he recognized the consistency of a state being both a "new" state and a "successor" state, and in the continued existence of treaties where there has been a change in sovereignty by succession.

Indeed, a "new" state free of international treaty obligations and possessing no treaty rights comes into being only when such state is not the successor to any previous sovereignty. Recent examples are Israel and Tripolitania, neither of which is a successor to the sovereignty of the power previously having jurisdiction over its territories, each having been made, so to speak, "out of whole cloth." This was not the case with Yugoslavia which

was formed by the voluntary union of former Austro-Hungarian provinces and Montenegro with the Kingdom of Serbia, an already existing sovereign state.

Thus, to say that Yugoslavia is a "new" state and therefore did not succeed to either the benefits or the obligations of Serbia, is to beg the question. On the basis of appellee's argument, Yugoslavia would have been the successor to Serbia if Serbia had conquered and absorbed Montenegro and the former Austro-Hungarian provinces, instead of having entered into voluntary union with them. The logical consequence of appellee's argument is that because Serbia did not annex and absorb the former Austro-Hungarian provinces and Montenegro, but entered into voluntary union with them, Serbia, for all international juridical purposes, must be deemed to have been annexed and absorbed by the former Austro-Hungarian provinces and Montenegro.

III.

"Recognition" Is Not Given Exclusively to "New" States Without Antecedents or Succession.

The even more extended discussion of "recognition" (Appellee's Br. pp. 17-31) is also completely devoid of both relevance and significance.

Appellee argues that "recognition" is extended only to "new" states, but United States recognized Yugoslavia, *ergo* Yugoslavia was a "new" state (see last paragraph page 17 and first paragraph page 20). Apart from the fallacy inherent in this argument that a "new" state may not also be the successor to the treaty rights and obligations of an "old" state, the Court will take judicial notice of the error in the premise. Thus, the United States

"recognized" Russia shortly after achieving its own sovereignty, for it will be recalled that John Quincy Adams was appointed Minister to the Court of St. Petersburg in 1809 (Am. Dict. Biog.). Obviously, when the United States withdrew its "recognition" of Russia in 1917, or thereabouts, and again "recognized" Russia in 1933, following the Litvinov Agreement, the United States was withdrawing and extending its "recognition" not of Russia or the Russian state but of the regime or government then holding power in Russia. If "recognition" was applicable only to "new" states, as distinguished from regimes and governments, there would be no public issue today with respect to the "recognition" or "non-recognition" of China, and there would have been no occasion to rerecognize Yugoslavia in 1946 [R. pp. 75-78] upon the replacement of the monarchy by the republic. In these instances, as in the more frequent cases that arise as the result of coups d'etat and pronunciamientos in Latin American countries, the question of "recognition" or "non-recognition" pertains not to the state itself but to a regime newly come into power.

Of course, "recognition" may also involve a "new" state as in the case, for example, of Israel and Tripolitania. But the fact of "recognition" gives rise to no inference as to whether the recipient of such "recognition" is a new government in an "old" state or a "new" state, or, in the case of the latter, whether the "new" state is or is not a successor of some other state.

IV.

Appellee's Attempted Gloss on Article 12 of the Treaty of St. Germain Is Contrary to the Plain Meaning of That Provision.

Appellee argues (Br. p. 34) that the implication from the reference in the Treaty of St. Germain-en-Laye to Serbia's treaties constitutes a recognition that but for such reference the treaties between Serbia and the parties to such treaty (the United States Senate never ratified it) would have lapsed. But as appellants have already pointed out, in effect (Op. Br. p. 33) the reference that such treaties "shall *ipso facto* be binding on the Serb-Croat-Slovene State," must be taken to mean what it says, *i.e.,* that such treaties are "automatically" binding and not that they are not automatically binding but binding only because of the St. Germain-en-Laye treaty.

Appellee's distorted construction is impossible of application. The very words *"ipso facto"* make the inclusion of this paragraph in that treaty merely a recognition that such treaties *by the very nature* of the case were binding upon the new Kingdom. And surely the negotiation of new treaties would effectually dispose of old treaties. In no sense could the signing of this treaty by representatives of this government, be construed as a decision recognizing the termination of Serbian treaties. It was the exact reverse. It was a recognition that *ipso facto* they continued.

Counsel for appellants does not wish to belabor the point by repeating the arguments of his opening brief,

but, since appellee places so much stress upon the point, takes the liberty of re-emphasizing the material appearing on pages 33-36 of his opening brief. Attention is directed, however, to the fact that where it was sought to *free* Serbia from a treaty obligation under the Treaty of Berlin of 1878, a specific paragraph was required, whereas all other treaties continued *ipso facto*.

V.

Appellee Has Wholly Failed to Weaken the Force and Effect of the Analogy of the Unification of Italy.

Appellee seeks to avoid the force of the arguments of appellants and *Amicus* as to the close analogy of the Italian union to the Yugoslav union by stressing the element of war and conquest in the former as distinguished from the peaceful and voluntary nature of the latter. We have already adverted to the absurdity of attaching a penalty to voluntary action, a penalty which would be contrary to the entire thrust of American foreign policy throughout its history. It should also be pointed out, however, that the very authority quoted by appellee at the conclusion of, and presumably as support for, this astounding proposition furnishes no such support since it does not even mention any such distinction. (See quotation from Harvard Research into the Law of Treaties, Appellee's Br. p. 39.)

In addition appellee ends up by completely cutting the ground from under his own feet. For in the remainder of his argument on this point he negates his own attempted distinction by arguing that in the case of Italy the annexation did not result in the carryover of the Sardinian Treaties to the annexed territories. While this argument appears to be strained and wholly incorrect

it highlights the thorough confusion and inconsistency of appellee's approach. For the very argument he uses to reach this result, that the United States is opposed to forcible annexation and therefore did not recognize its effect, is squarely opposed to his earlier argument that it is the element of force and conquest which is essential for the transfer of sovereignty and of the international rights and obligations attached thereto.

The weakness of appellee's attempted distinction points up the fact that in all essential elements the formation of Yugoslavia corresponds to the formation of Italy, without the factor, recognized by appellee himself as negative, of the use of force. The unification of South Slav peoples was preceded by centuries of persistent common struggle against the oppressors—Turkey, Austro-Hungary, the Republic of Venice. In the course of this long-lasting struggle an awareness of the unity of their interests and of the necessity of unification as a guarantee of final success was developed. In the period of the awakening of national awareness, as well as of the strengthening of national movements and formation of national individuality, there appeared in various forms a deeper political and cultural cooperation as well as a completely formed national ideology on the unity of all South Slav peoples. Serbia, which through two uprisings (1804 and 1815) secured relative independence, and later full independence in the war against Turkey (1876-1878), became the center of the liberation struggle of the South Slav peoples as a potential nucleus around which unification could be completed.

Serbia, as an independent state and one which had greater political and material possibility, was able to develop the strongest activity for unification as the center

of attraction for all South Slav peoples under the rule of Turkey and Austro-Hungary. This position of Serbia made it possible for her to play the role in the unification of the South Slav peoples which Piedmont played in the unification of the Italian peoples.

VI.

The Attempted Distinction of Terlinden v. Ames Serves Merely to Emphasize the Binding Force of That Decision.

The confusion in appellee's basic approach carries over to his labored attempt to distinguish *Terlinden v. Ames,* and thus to escape the binding force of that decision here. He purports to find the basis for that decision solely in the circumstance that the states composing the German Empire continued to exercise a certain power to enter into international arrangements with respect to extradition. But the abbreviated quotation at page 44 of appellee's brief fails to disclose what clearly appears from the remainder of the text quoted, that is that such power was by leave of the Imperial Government pending the exercise by it, in the field of extradition, of its plenary foreign affairs powers under the German Imperial Constitution. See *Terlinden v. Ames,* 185 U. S. at 285, 286, *id.,* 284, 285. Moreover, the Court, far from giving the circumstance relied on by appellee the weight he would give it, merely commented as follows after referring to it (185 U. S. at 286):

> "Thus it appears that the German Government has officially recognized, and continues to recognize, the treaty of June 16, 1852, as still in force, as well as similar treaties with other members of the Empire, so far as the latter has not taken specific action to the contrary or in lieu thereof."

It would hardly appear that appellee's point was the *ratio decidendi* of *Terlinden v. Ames.*

Furthermore, in none of the other cases following *Terlinden v. Ames,* and holding that treaties other than extradition treaties of the German States composing the Empire, survived the creation to the Empire, is any consideration given or reference made to any continuing power of any such state to enter into new international engagements in the fields covered by such treaties. See *The Disconto Gesselschaft v. Umbreit,* 208 U. S. 570; *The Sophie Rickmers,* 59 F. 2d 464; *Flensburger Dampfercompagnie v. United States,* 59 F. 2d 464. On appellee's thesis, in the absence of such a showing such treaties should have been deemed terminated as of the date of the organization of the German Empire, but in each case the continuing validity of the treaty was upheld.

Other attempts by appellee to distinguish *Terlinden v. Ames, supra,* are pure sophistry.* Appellee labors to show that a different set of historial facts were present in the formation of the German Empire than were present in the formation of the Kingdom of Serbs, Croats and Slovenes. Concedely, this is so. Appellee totally fails, however, to show that the legal principle delineated in

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*In his attempt to avoid the effect of *Terlinden v. Ames, supra,* appellee strains at an unintentional omission (see Appellee's Br. p. 45) in one of Appellants' quotations from that case. Here Appellants used the words "adoption of the German Empire" instead of "adoption of the constitution of the German Empire". Counsel for appellants apologizes for the unintentional inaccuracy, but submits that it in no way changes nor distorts the clear meaning of the paragraph, nor the applicability of the rule announced to the formation of the Kingdom of the Serbs, Croates and Slovenes. Obviously what the court was referring to was the creation of the German Empire.

Terlinden v. Ames is not here applicable. This principle, restated, is that the question of whether a treaty survives political changes in the character of the other party to it, is in its nature essentially political and not judicial, and that the courts ought not to interfere with the conclusion of the Executive Branch in that regard.

In short, appellee's arguments cannot and do not avoid the rule of political decision. The continuing validity of the treaty here in question has been affirmed by both governments concerned, and under such circumstances, it "is out of the question," as the Court said in *Terlinden v. Ames,* 184 U. S. at 286, that a citizen of one of them, charged with being a fugitive, "should call on the courts of this country to adjudicate the correctness of the conclusions" of his own government and of our own.

Conclusion.

As presaged in the introductory comment herein, appellee's attempt to find a basis for overriding the positions of both the United States and Yugoslav governments and destroying a substantial portion of the basic fabric of the treaty relationships between the two countries has been shown to be wholly without support in either reason or authority. That the Union of the former Austro-Hungarian provinces and Montenegro with Serbia was voluntary and not imposed by force was and is a source of gratification. It is certainly not a basis for denying the Union's succession to Serbia in international relations, a succession recognized and acted upon over a period of

32 years by both Governments. If the judicial branch rather than the executive branch had had to make the decision, we believe the decision would undoubtedly have been the same for the reasons set forth in appellant's briefs and the *amicus* brief of the Government. Appellee's clear failure to distinguish *Terlinden v. Ames* emphasizes, however, that the decision was one for the executive branch and that its decision is controlling.

Respectfully submitted,

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